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Supreme Court of the United States

October Term, 1937

No. 882

MARION H. ALLEN, Collector
of Internal Revenue for the District of Georgia,
Petitioner,

vs.

REGENTS OF THE UNIVERSITY SYSTEM
OF GEORGIA,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Respondent does not deny that the ultimate question of whether a Federal tax can be laid upon admission charges to athletic contests held by a State through its educational system is a question of importance. Nor does respondent deny that the related question of whether the Federal Government can force the State, or the State agency, to collect taxes for it, is also a question of importance. Frankness on our part in dealing with the Court requires this definite statement to be made. It would, however, not follow necessarily that a writ of certiorari should be granted. We believe the decision of the Circuit Court of Appeals is in accord with well settled principles. This Court may feel, however, that the question is of sufficient importance to justify a further decision by this Court. As to this we express no definite view since, necessarily, it would depend upon the extent of pressure upon the Court's time of other

and more important or more doubtful matters.

The purpose of this response is primarily to request the Court, should it determine to grant the writ of certiorari, to provide in its order that the scope of review be limited to the two questions indicated, namely: (1) Whether the Federal amusements tax can be levied upon admissions to athletic contests held by a State agency conducted as a part of the State's educational program under the facts and circumstances of this record; and (2) whether the Federal Government can force such State agency to act as its collecting agent with respect thereto.

*In the margin are noted precedents from this Court following the practice of limiting the scope of review on certiorari.

The necessity for limiting the review in this case grows out of the following:

The Government, while purporting to desire the fundamental questions here involved to be settled as rapidly as possible, has at the same time throughout the entire history of this case endeavored to prevent a decision on the merits. Indeed, it is not too much to say that this record discloses an effort to avoid a decision on the merits by raising every possible procedural question having no relation to the ultimate merits. It further discloses that the representatives of the State of Georgia have been struggling throughout the litigation to arrive at a determination of the basic questions.

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*Brown v. Commissioner, 290 U. S. 607; City of Lincoln v. Ricketts, Trustee, 296 U. S. 566; Commonwealth Trust Co. v. Atwood, 296 U. S. 566; Pacific Coast Steel Co. v. McLaughlin, Coll., 287 U. S. 595; Shumacher v. Beeler, 293 U. S. 544; U. S. Shipping Board Corp. v. Rhodes, 296 U. S. 568; Van Der Weyde v. Ocean Transport Co., 296 U. S. 567.

For example: Before this litigation commenced the Regents of the University System of Georgia first endeavored to raise the question by paying in an amount equal to the tax then claimed and filing a claim for a refund. They were met by a decision of the Treasury Department that such procedure was improper and that a claim for a refund could not be considered because the Regents of the University System of Georgia was not the taxpayer but in the relation of a collecting agency. (R. pp. 22, 154, 320 thru 328.)

Thereupon, having no other possible remedy, the respondent herein brought its suit in equity in an effort to raise the question by restraining the collection of further amounts. Whereupon the Government immediately presented the wholly inconsistent claim that respondent could not sue for equitable relief since it had a remedy by paying in the alleged tax and seeking a refund. This position has been pressed by the Government throughout the litigation, in total disregard of the fact that respondent had attempted to pursue that remedy and had been refused the same upon the ground that it was not an available remedy, in which respondent was obliged to acquiesce.

Furthermore, the Government has sought to prevent a decision on the merits by the claim that respondent had voluntarily collected a tax for the Government and hence could not retain the fund so collected. This, notwithstanding the fact that each ticket sold by respondent bore upon the face thereof the following:

> "The University of Georgia being an instrumentality of the government of the State of

> Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the University is required to do so by Treasury Regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax."

As another example of the effort to avoid a decision on the merits by procedural questions respondent points out that while this case was pending in the Circuit Court of Appeals the Collector of Internal Revenue, against whom the action was brought, resigned his office and a successor was appointed. Respondent thereupon moved to substitute the successor pursuant to Section 780 of Article 28 of the U. S. Code. The Government thereupon objected to the substitution and asserted that the whole proceeding had become moot and an entirely new suit must be brought in the District Court against the new Collector. The proceedings in this respect in the Circuit Court of Appeals are shown in the Record, pp. 447 thru 452.

And as a final example, respondent refers to the petition for certiorari now before the Court in which it is sought to have all of these procedural questions reopened and reviewed in this Court.

We do not believe that any of the procedural questions raised are well founded. We believe the decision of the Circuit Court of Appeals, when this case was first before it (81 Fed. (2) 577), is entirely sound, in which that court pointed out that there was no other way known to the law whereby a branch of the State

government, seeking to raise these questions, could proceed except the method followed by respondent in this case. But it is respectfully submitted that if any of these technical questions of procedure are well founded they would not be of sufficient moment to justify the granting of a writ of certiorari. Hence, if the writ is granted it necessarily would be solely for the purpose of reviewing the merits relative to this controversy on the issues heretofore pointed out. In that situation it would be exceedingly unfortunate for any technical question of procedure to frustrate the whole purpose for which the writ was granted. Therefore, we respectfully insist that the present case is typical of the kind in which the Court should restrict the scope of the review to those questions, and those only, which justify the granting of the writ.

Respectfully submitted,

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